

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION**

**DELTA AUCTION & REAL ESTATE CO., INC. PLAINTIFF**

**VERSUS      CIVIL ACTION NO. 2:99CV255-P-B**

**INTERNAL REVENUE SERVICE OF THE  
UNITED STATES OF AMERICA, SIMPSON,  
STEPP & LOTT LUMBER CO., INC.,  
A MISSISSIPPI CORPORATION, HARDWARE  
DISTRIBUTION WAREHOUSES, INC.,  
THOMAS WOOD PRESERVING, INC., MAGNOLIA  
FOREST PRODUCTS, INC., and BUILDING**

**PLASTICS, INC.      DEFENDANTS**

**MEMORANDUM OPINION**

This cause is before the Court for a decision based on a stipulation of facts and the briefs submitted by the parties. The Court, having reviewed the briefs, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

**FACTUAL BACKGROUND**

**Delta Auction & Real Estate Co., Inc.**

The Court hereby adopts the Stipulation of Facts submitted by the parties as the operative facts which are to be applied to the question presented by the parties for decision. They are as follows:

1. Simpson, Stepp & Lott ("SS&L") heretofore operated lumber businesses in Greenwood (LeFlore County) Mississippi and Lexington (Holmes County) Mississippi. Pursuant to a contract with SS&L, Delta Auction & Real Estate Co., Inc. ("auctioneer") conducted auction sales of the personal property inventory of SS&L on September 29, 1999 in LeFlore County, Mississippi and on September 30, 1999 in Holmes County, Mississippi.

2. The proceeds from the auction sale in LeFlore County, Mississippi were \$67,675.00.
3. The proceeds from the auction sale in Holmes County, Mississippi were \$8,946.43.
4. Auctioneer earned a commission of sale in the amount of \$11,493.22, and incurred real estate advertising costs of \$1,500.00 and trash disposal costs of \$200.00 from the proceeds from the auctions sales.
5. The commissions set forth in Stipulation No. 4 are allocated as follows: \$10,151.25 is allocated from the proceeds from the auction sale in LeFlore County and the amount of \$1,341.97 is allocated from the proceeds from the auction sale in Holmes County.
6. The real estate advertising costs in the amount of \$750.00 is allocated from the proceeds from the auction sale in LeFlore County and the amount of \$750.00 is allocated from the proceeds from the auction sale in Holmes County.
7. The trash disposal costs in the amount of \$200.00 is allocated from the proceeds from the auction sale in Holmes County.
8. The aggregate amount earned and incurred by Delta Auction & Real Estate Co., Inc. in conducting the auction sales in LeFlore County and Holmes County is \$13,193.22.

Proceeds from the Auction Sale in LeFlore County, Mississippi

9. The United States filed a Notice of Federal Tax Lien in LeFlore County, Mississippi for unpaid employment taxes of SS&L (Form 941) for the taxable period ending 12/31/97 on June 12, 1998 in the amount of \$21,866.29.
10. The balance due through May 3, 2000 on the unpaid employment taxes (Form 941) for the taxable period ending 12/31/97 is \$18,659.9
11. Metal Sales, Inc. (MSI) enrolled a judgment against Simpson, Stepp & Lott Lumber Company, Inc. in LeFlore County, Mississippi on October 15, 1998 in the amount of \$13,808.95.
12. MSI's judgment is currently paid down to \$8,808.95.
13. MSI did not have a writ of garnishment issued or served.
14. MSI is not a party to this action.
15. Building Plastics, Inc., ("BPI") obtained a judgment against Simpson, Stepp & Lott

Lumber Company, Inc. in the County Court of LeFlore County, Mississippi on November 2, 1998.

16. The judgment of BPI was enrolled in LeFlore County, Mississippi on November 4, 1998, in the total amount of \$7,442.79, plus interest accruing from and after September 10, 1998.

17. BPI obtained a writ of garnishment issued by the County Court of LeFlore County, Mississippi on September 24, 1999 which was served on the auctioneer on September 29, 1999.

18. The United States filed a Notice of Federal Tax Lien in LeFlore County, Mississippi for unpaid employment taxes of SS&L (Form 941) for the taxable period ending 03/31/98 on November 24, 1998 in the amount of \$5,209.98.

19. The balance due through May 3, 2000 on the unpaid employment taxes (Form 941) for the taxable period ending 03/31/98 is \$6,689.97.

20. The United States filed a Notice of Federal Tax Lien in LeFlore County, Mississippi for unpaid employment taxes of SS&L (Form 941) for the taxable period ending 06/30/98 on February 16, 1999 in the amount of \$6,771.07.

21. The balance due through May 3, 2000 on the unpaid employment taxes (Form 941) for the taxable period ending 06/30/98 is \$8,753.16.

22. Magnolia Forest Products, Inc. ("MFP") obtained a judgment against Simpson, Stepp & Lott Lumber Company, Inc. in the County Court of the First Judicial District of Hinds County, Mississippi on August 10, 1998.

23. The judgment of MFP was enrolled in LeFlore County, Mississippi on June 3, 1999, in the amount of \$13,143.25. This judgment has been paid down to \$9,643.25.

24. MFP obtained a writ of garnishment issued by the County Court of LeFlore County, Mississippi on September 29, 1999 which was served on the auctioneer on September 29, 1999.

25. The United States filed a Notice of Federal Tax Lien in LeFlore County, Mississippi for unpaid employment taxes of SS&L (Form 941) for the taxable period ending 12/31/97 on June 15, 1999 in the amount of \$13,582.98.

26. The balance due through May 3, 2000 on the unpaid employment taxes (Form 941) for the taxable period ending 12/31/97 is \$18,659.69.

27. Thomas Wood Preserving, Inc. ("TWP") obtained a judgment against Simpson, Stepp & Lott Lumber Company, Inc. in the County Court of LeFlore County, Mississippi on June 21, 1999.
28. The judgment of TWP was enrolled in LeFlore County, Mississippi on June 21, 1999, in the amount of \$30,069.33.
29. TWP obtained a writ of garnishment issued by the County Court of LeFlore County, Mississippi on September 14, 1999 which was served on the auctioneer on September 29, 1999.
30. Hardware Distribution Warehouses, Inc. ("HDW") obtained a judgment against Simpson, Stepp & Lott Lumber Company, Inc. in the County Court of LeFlore County, Mississippi on July 19, 1999.
31. The judgment of HDW was enrolled in LeFlore County, Mississippi on July 20, 1999, in the amount of \$26,237.82.
32. HDW obtained a writ of garnishment issued by the County Court of LeFlore County, Mississippi on September 21, 1999 which was mailed to the auctioneer in Memphis, Tennessee and received by him on September 23, 1999. The auctioneer acknowledged receipt of their garnishment by mail.
33. The United States filed a Notice of Federal Tax Lien in LeFlore County, Mississippi for unpaid employment taxes of SS&L (Form 941) for the taxable periods ending 12/31/97, 03/31/98, 06/30/98, 09/30/98, and 12/31/98, and unpaid unemployment taxes (Form 940) for the taxable period ending 12/31/98, on September 22, 1999 in the amount of \$51,680.49.
34. The balance due through May 3, 2000 for the aggregate of the taxable periods listed in Stipulation No. 33 is \$65,122.65.
35. The United States served a Notice of levy on the auctioneer for unpaid employment taxes (Form 941) for the taxable periods ending 12/31/97, 03/31/98, 06/30/98, 09/30/98, and 12/31/98, and unpaid unemployment taxes (Form 940) for the taxable period ending 12/31/98, on September 29, 1999 in the amount of \$59,773.63. This Notice of Levy was served on the auctioneer prior to the service of the other garnishments on September 29, 1999.
36. The balance due through May 3, 2000 for the aggregate of the taxable periods listed in

Stipulation No. 35 is \$65,122.65.

Proceeds from the Auction Sale in Holmes County, Mississippi

37. The United States filed a Notice of Federal Tax Lien in Holmes County, Mississippi for unpaid employment taxes of SS&L (Form 941) for the taxable periods ending 12/31/97, 03/31/98, 06/30/98, 09/30/98, and 12/31/98, and unpaid unemployment taxes (Form 940) for the taxable period ending 12/31/98, on September 13, 1999 in the amount of \$51,680.49.

38. The Notice of Federal Tax Lien filed in Holmes County, Mississippi for unpaid unemployment taxes (Form 940) for the taxable period ending 12/31/98 was in the amount of \$1,240.06.

39. The balance due through May 3, 2000 on the unpaid unemployment taxes (Form 940) for the taxable period ending 12/31/98 is \$1,508.12.

40. The Notice of Federal Tax Lien filed in Holmes County, Mississippi for unpaid employment taxes (Form 941) for the taxable period ending 09/30/98 was in the amount of \$12,032.93.

41. The balance due through May 3, 2000 on the unpaid employment taxes (Form 941) for the taxable period ending 09/30/98 is \$14,365.61.

42. The Notice of Federal Tax Lien filed in Holmes County, Mississippi for unpaid employment taxes (Form 941) for the taxable period ending 12/31/98 was in the amount of \$12,779.97.

43. The balance due through May 3, 2000 on the unpaid employment taxes (Form 941) for the taxable period ending 12/31/98 is \$15,146.10.

44. The balance due through May 3, 2000 for the aggregate of the taxable periods listed in Stipulation No. 37 is \$65,122.65.

45. The judgment of HDW was enrolled in Holmes County, Mississippi on September 29, 1999, in the amount of \$26,237.82.

46. The judgment of TWP was enrolled in Holmes County, Mississippi on September 24, 1999, in the amount of \$30,824.

47. The amount of the judgment TWP enrolled in Holmes County, Mississippi included 8% interest from June 21, 1999 through September 23, 1999.

The following additional facts were also stipulated to by the parties:

1. Delta Auction & Real Estate Co., Inc. was contacted by Simpson, Stepp & Lott Lumber Co., Inc., for the purpose of selling the inventory, fixtures and equipment for a commission. Delta Auction & Real Estate Co., Inc. is a regional auction company that has been in operation for over twenty-five (25) years.
2. A contract was entered into for the sale of the personal property with Simpson, Stepp & Lott Lumber Co., Inc., which is attached hereto and incorporated herein by reference and marked Exhibit "A".
3. The Internal Revenue Service was aware of the sale as shown by the letter to Delta Auction & Real Estate Co., Inc. which is attached hereto and incorporated herein by reference and marked Exhibit "B".
4. Mr. Curtis A. Betts, an agent of the Internal Revenue Service, and one additional Internal Revenue Service agent, were present both days of the sale and encouraged Delta Auction & Real Estate Co., Inc. to complete the sale so that the inventory, fixtures and equipment could be reduced to a monetary amount.
5. Delta Auction & Real Estate Co., Inc. then employed an attorney and has taken the necessary steps to interplead the money from the sale so that the moneys may be properly distributed.
6. Delta Auction & Real Estate Co., Inc. incurred expenses in conducting the sale and in employing an attorney who has actively filed an interpleader action and sought to have the moneys properly paid to the proper judgments, creditors and lienholders.

#### LEGAL ANALYSIS

The questions presented to the Court for decision are as follows:

1. What is the order of priority of creditors with respect to the proceeds from the auctions held in LeFlore and Holmes Counties?
2. Is the auctioneer, Delta Auction & Real Estate Co., Inc. entitled to its earned

commission and expenses related to the sales, or lieu of that, some reasonable compensation for the services it provided toward liquidating the debtor's assets in order to satisfy the claims of the various creditors?

3. Is the auctioneer, Delta Auction & Real Estate Co., Inc. entitled to recover attorney fees and its costs of action in filing the instant interpleader action?

4. In view of the answers to the foregoing questions, how are the proceeds from the sale to be applied?

The Court will address each of these questions in the order listed, logically beginning with the priority of claims against the auction proceeds.

A. Priority of Claims

After careful consideration of the authorities cited by the parties, the Court finds that Merideth v. United States is the controlling authority in this case and that the priority of the various creditors is to be determined according to the order in which the various notices of tax lien and judgments were filed and/or enrolled in LeFlore and Holmes counties.<sup>1</sup> 327 F. Supp. 429 (N.D. Miss. 1970), aff'd per curiam, 449 F.2d 186 (5<sup>th</sup> Cir. 1971). That being the case and according to the Stipulation of Facts, the proceeds of the sale are to be applied in the following order of priority:

LeFlore County

Date of Filing/Enrollment

Amount of Claim at Time of Sale

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<sup>1</sup> The Court has considered and rejected the defendant HDW's argument that priority of creditors should be determined according to the order in which the garnishments and/or notices of tax lien were served upon the auctioneer. Under a reasoned application of Mississippi law, the service of a garnishment merely serves to put more senior creditors on notice of the need to act to protect their rights. Only in the absence of such action may a junior creditor's claim be satisfied ahead of more senior judgment creditors—as in the case of BPI in this case.

Given the Court's resolution of HDW's arguments concerning priority, it is unnecessary for the Court to examine whether HDW's attempted service of its garnishment by mail was effective, inasmuch its claim is the most junior and the proceeds of the two sales are exhausted by application to the claims of more senior creditors.

1.	United States	\$18,659.69
2.	BPI	\$ 8,140.06
3.	United States	\$ 6,689.97
4.	United States	\$ 8,753.16
5.	TWP	\$30,069.33
6.	HDW	\$26,237.82

#### Holmes County

	Date of Filing/Enrollment	Amount of Claim at Time of Sale
1.	United States	\$31,019.83 <sup>2</sup>

Given the paucity of the funds generated by the Holmes County Sale, it is unnecessary to consider the priority of the other, more junior creditors whose judgments were enrolled subsequent to the filing of the United States' Notice of Tax Lien.

#### B. Delta Auction's Entitlement to Commission

After review of the facts of the case, the Court is of the considered opinion that Delta Auction is entitled to recover the entirety of its commission and expenses of sale for the services provided in conjunction with the LeFlore and Holmes counties sales. Both state and federal law provide avenues for payment of costs of sale and/or commissions in appropriate cases. See 26 U.S.C. § 7430(c)(2) (administrative costs allowed in tax lien cases) and Miss. Code Ann. § 13-3-113 and §25-7-19 (providing commission schedule for sheriff's services in execution of judgments). See also Ms. Op. Atty. Gen., No. 98-0023, Blaker, Jan. 30, 1998 (providing for deduction of costs of sale and commission in accordance with § 25-7-19 before distributing funds in order of priority. Likewise, in a situation involving a secured creditor's repossession and sale of a defaulting debtor's property, § 75-9-504 of the Mississippi Code provides for the deduction of costs of repossession and

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<sup>2</sup> This sum represents the amount left unsatisfied after application of the proceeds of the LeFlore County sale.



sale from the proceeds before application to the indebtedness secured by the property. The Court can think of no distinguishing factors in the case of a debtor who voluntarily liquidates property in order to satisfy tax liens and judgment creditors. In addition, the United States and all other creditors were fully aware of the impending sale and not only acquiesced in it, but actively encouraged it. Based on the foregoing, the Court finds that Delta Auction is entitled to recover its full commission and expenses of sale out of the interplead proceeds, or the sums of \$12,243.22 from the LeFlore County sale and \$2,291.97 from the Holmes County sale.

C. Delta Auction's Claim for Attorney's Fees and Costs of Action

The Court has considered Delta Auction's claim for attorney's fees and costs of the action and is of the firm opinion that such a request is not well-taken and should be denied. Recovery of such fees and expenses should be limited to those instances involving a mere stakeholder who has no interest in the outcome of the action. Delta Auction, by contrast, filed this action with an interest in recovering a portion of the interplead funds in the form of a commission and expenses of sale. That claim has been sustained. Any further relief is not warranted.

D. Application of the Sale Proceeds

Based on the foregoing analysis, the proceeds of sale are to be applied in the following fashion:

The total proceeds from the sale held in LeFlore County are \$67,675.00. From that total, Delta Auction is due \$12,243.22, representing \$11,493.22 in commission on the sale and \$750.00 in advertising costs. The amount remaining after allowing for Delta Auction's commission and expenses is \$55,431.78. Based on the priorities as listed in subsection A. above, the United States is entitled to satisfaction of each of the tax liens filed in LeFlore County, for a total of \$34,102.82. BPI and MFP are also entitled to full satisfaction of their judgments in the amounts of \$8,140.06 and \$9,643.25 respectively. The remaining balance of \$3,545.65 is to be applied toward the satisfaction of TWP's judgment.

As for the \$8,946.43 in proceeds from the Holmes County Auction, they are to be dispersed in the following manner: \$2,291.97 to go to Delta Auction in payment of its commission in the amount of \$1,341.97 and \$950 in advertising and trash disposal fees. The remaining \$6,654.46 is to be paid to

the United States in partial satisfaction of the remaining tax lien.

A judgment will issue accordingly.

This, the \_\_\_\_\_ day of January, 2001.

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W. ALLEN PEPPER, JR.  
UNITED STATES DISTRICT JUDGE